Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

RICHARD BURNS,

Petitioner,

vs.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

RICHARD BURNS
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QUESTIONS PRESENTED

1. Does a citizen really ever get an opportunity for a full and meaningful appropriate pre-seizure or post-seizure wage hearing as required by this Court in *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 89 S. Ct. 1820, 23 L. Ed. 2d 349 (1969) and *Fuentes v. Shevin*, 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972)?

2. Does *Dioguardi v. Durning*, 139 F.2d 774 (2d Cir. 1944), which distinguishes the difference between a Rule 12(b)(6) motion "*failure to state a claim upon which relief can be granted*" and the court's grounds "*failing to state a cause of action*" upon which this complaint was dismissed constitute erroneous judgment precluding the motion to dismiss requiring reversal of Courts' decisions on the grounds that "*cause of action*" is not required by said Rule?

3. Does *Board of Regents, Etc. v. Tomanio*, 466 U.S. 478, 100 S. Ct. 1790, 64 L. Ed. 2d 440 (1980); and *Halkey-Roberts Corp. v. Mackal*, 641 So. 2d 445 (Fla. App. 2 Dist. 1994), preclude a Rule 12(b)(6) motion and constitute erroneous judgment in not applying both "borrowed" Florida's statute of limitations in Frauds, F.S. sec. 95.11(3)(j), and its "discovery rule", sec. 95.031(2), as applied to a 42 U.S.C. § 1983 claim founded on fraud which occurred in a "fiduciary relationship" to toll the limitations period, until the discovery of the alleged fraud; which then activates the four years limitation to begin?

LIST OF PARTIES

The parties to the proceedings are:

Petitioner:

RICHARD BURNS

Respondents:

UNITED STATES OF AMERICA; INTERNAL REVENUE SERVICE; INTERNAL REVENUE SERVICE OFFICER, ALAN KELSO; INTERNAL REVENUE SERVICE UNKNOWN AGENTS, City of Miami Fire Fighters' and Police Officers' Retirement Trust Personnel: DONALD MARCH, JR., AURELIO PEREZ-LUGONES, JESSE DINER, CHARLES HALL, ALEXANDER GURDAK, TYRONE KENNEDY, ROBERT WEILBACHER, MARK WISNER, ELENA RODRIQUEZ, and STEPHEN CYPEN.

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OPINIONS BELOW

Report and Recommendation of United States Magistrate, Stephen T. Brown, dated October 29, 1993. (App. C, 8a-16a).

ORDER, affirming Magistrate's Report and Recommendation, dismissing complaint with prejudice, Judge James L. King, dated November 22, 1993. (App. B, 3a-7a).

Final Order sought to be reviewed on appeal by the Eleventh Circuit Court of Appeals, was affirmed per curium by Circuit Judges, Kravitch, Hatchett and Dubina, dated February 1, 1995. (App. A, 1a-2a).

STATEMENT OF JURISDICTION

This Court's jurisdiction to review a post-judgment or decree of the United States Court of Appeals for the Eleventh Circuit on Petitioner's appeal from the decision of the United States District Court for the Southern District of Florida, is invoked pursuant to Title 28 U.S.C. § 1254(1). This Petition for Writ of Certiorari is timely filed within 90 days of February 1, 1995, by May 1, 1995 pursuant to Title 28 U.S.C. § 2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner brought this Complaint, pursuant to Fed. R. Civ. P. 9(b), Fraud, in the United States District Court for the Southern District of Florida invoking the Fourth, Seventh and Fourteenth Amendments of the United States Constitution; 42 U.S.C. § 1983; 26 U.S.C. § 6331(a)(b) and 28 U.S.C. § 1343(3)(4); and 31 U.S.C. § 3541(a)(b) with regard to municipal Respondents, and pursuant to the United States Constitution, Article III, § 2, ¶ 1; the Fourth, Fifth and Seventh Amendments of the United

States Constitution; 26 U.S.C. § 6331(a)(b); 28 U.S.C. §§ 2463 and 1331; 31 U.S.C. § 3541(a)(b) with regard to federal Respondents as amended in Complaint.

STATEMENT OF THE CASE

A. Historical Background

In January of 1987, the Petitioner, a retired police officer of the City of Miami, Florida was notified by letter from the Administrator of the Pension Board that they had received a Notice of Levy enclosed pursuant to 26 U.S.C. § 6331 from the Internal Revenue Service. The form deleted their authority so Petitioner demanded by return letter that the Pension Board not honor the Notice of Levy; that a court order should be honored in lieu of only a notice so that a judicial hearing could take place prior to any seizure.

However, in February 1987 when Petitioner received his monthly check approximately 87% of the wage earnings due were deducted under heading "Misc." Petitioner went to the Pension Office for an explanation from the Administrator regarding the deduction from the pension and was curtly told Petitioner's money was given to the IRS. When asked by what authority did she act, she condescendingly stated to take it up with the IRS and leave the office or she would call the police to have Petitioner arrested.

Petitioner then wrote immediately to the Pension Board, a fiduciary retirement trust, requesting a hearing which was by then to be a post-seizure hearing as to the authority by which both, the IRS and the Pension Administrator, had acted in their pre-seizure of Petitioner's pension funds without a judicial hearing and over his written objections.

A hearing after two seizures was given at the next regular Pension Board meeting on March 27, 1987; however, it was definitely not a full and meaningful hearing. There was no opposing IRS witness appearing to swear and testify to the truth of their authority and Petitioner's liability. Only the Petitioner was sworn to the truth.

Petitioner's letter and hearing arguments were that such seizures accompanied with only a "Notice of Levy" and no judicial hearing prior to seizures violated the Fourth Amendment and Due Process Clause of the Fifth and Fourteenth Amendment and the Seventh Amendment denying Petitioner's right to his property and without trial by jury.

The Petitioner was not a person enumerated in 26 U.S.C. § 6331(a) to be levied; therefore, the IRS was acting without any legal authority and the Board was too. All the trustees of the Pension Board present and their attorney seemed to resent these arguments and did reject them. The Board concurred unanimously that the courts have ruled that Petitioner was included as a person to be levied within the language of the statute 26 U.S.C. § 6331(a) and Petitioner's rights were not being violated by this procedure of seizures. Although Petitioner requested and was promised a copy of that court's decision would be mailed to him, it was never done.

It was at this one-sided perfunctory hearing that Petitioner was deceived into believing the Pension Board's opinions and its misrepresentations of law that a distraint in civil law was a reasonable exception to the Fourth Amendment to seize without a warrant and that prior hearings were unnecessary by the IRS to seize property. Therefore, the Board voted it was justified to seize Petitioner's personal pension funds from his trust account without any warrant signed by a judge and give the funds to the IRS, irrespective of the Board's legal responsibilities to beneficiaries.

The Petitioner, not being an attorney and for the lack of knowledge of distraint in civil law and the undue influence and misrepresentations of the Pension Board, some being attorneys, the Petitioner could not refute these misrepresentations at the time.

The 87% seizures of Petitioner's monthly pension wage earnings occurred from February 1987 monthly through October 1988 amounting to nearly $60,000 dollars causing Petitioner's injury.

On or about August 1, 1990, Petitioner discovered the knowledge of the fraud and deceit perpetrated by all the Respondents. In September of 1990, Petitioner wrote letters to the Pension Board and to the IRS claiming they had committed a fraud by levying Petitioner in violation of the Fourth Amendment, but to no avail.

Petitioner sought an attorney, but not having the money to afford an attorney, Petitioner had to study and prepare a *pro se* Complaint filed on February 10, 1993 in the United States District Court for the Southern District of Florida. An Amended Complaint was entered on April 27, 1993 pursuant to Fed. R. Civ. P. 15(a).

B. Statement of Facts

(i) The Parties

Petitioner:

Is an individual, natural born citizen of the State of Florida, retiree and beneficiary in the City of Miami, Florida pension system, a fiduciary trust, created by city ordinance? He is not an attorney nor is he an employee of the United States Government.

Respondents: (two classes)

(1) Federal:

Those individuals who are federal officials and/or an agency employed and cloaked with authority by the United States government to enforce revenue laws.

(2) State:

Those individuals who are municipal officials employed by the City of Miami, Florida cloaked with authority to administer the city pension system, a fiduciary trust, in which trust the Petitioner is a retiree beneficiary. A fiduciary relation exists between the trust and all members and beneficiaries by City Ordinance No. 10002. The IRS holds powerful sway over the activities of this Board and its IRS qualified trust fund plan.

(ii) Judicial Decisions in This Case

The assigned United States Magistrate Judge Brown, made a Report and Recommendation to dismiss the case upon motions of Respondents for reason (1): "pursuant to Rule 12(b)(6) claiming that the complaint cannot state a cause of action", and reason (2): "a Motion to Dismiss under the same rule based on the allegations that the claim is barred by the Statue of Limitations." Dated: October 29, 1993. (App. C, 8a).

The District Court Judge King, issued an Order affirming U.S. Magistrate's Report and Recommendation and Dismissing Petitioner's Complaint With Prejudice: "*ORDERED and ADJUDGED that for the reasons in the Report and Recommendation Plaintiff's complaint be, and the same is hereby, DISMISSED WITH PREJUDICE.*" Dated: November 22, 1993. (Emphasis supplied) (App. B, 7a).

Petitioner filed a timely notice of appeal to the Eleventh Circuit Court of Appeals on December 7, 1993. Title 28 U.S.C. § 1291 provided federal appellate jurisdiction over the final Order of the District Court.

The United States Court of Appeals for the Eleventh Circuit *affirmed the Order of the District Court in a per curium decision* on February 1, 1995. (Emphasis supplied) (App. A, 1a).

REASONS FOR GRANTING THE WRIT

THE DECISIONS BELOW PRESENTS AN IMPORTANT UNANSWERED PRACTICABLE QUESTION, DOES A CITIZEN REALLY EVER GET A FULL AND MEANINGFUL APPROPRIATE PRE-SEIZURE WAGE HEARING REQUIRED BY *SNIADACH v. FAMILY FINANCE CORP.*, 395 U. S . 337, 89 S. Ct. 1820, 23 L. Ed. 2d 349 (1969)? DECISIONS BELOW CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEAL, SUPREME COURT, ITS RULES, AND STATUTORY LAW: CONFLICTS WITH OTHER COURTS OF APPEAL AND IS ERROR IN JUDGMENT IN THAT "FAILURE TO STATE A CAUSE OF ACTION "IS NOT AN EXCEPTION ALLOWING FOR A MOTION TO DISMISS UNDER FED. R. CIV. P., RULE 12(b)(6); *DIOGUARDI v. DURING*, 139 F.2d 774, 775 (2d Cir. 1945); SECOND CONFLICT IS WITH THIS COURT, AND IS ERROR IN JUDGMENT IN THAT THE FEDERAL COMMON LAW "EQUITY DOCTRINE", REGARDING FRAUD AND TOLLING STATUTE OF LIMITATIONS IN SECTION 1983 EQUITY CLAIMS, *HOLMBERG v. ARMBRECHT*, 327 U.S. 392, 66 S. Ct. 582, 90 L. Ed. 743 (1946); AND THIRD CONFLICT IS WITH THIS COURT AND TITLE 42 U.S.C. § 1988 IN NOT APPLYING FLORIDA STATUTE, SECTION 95.11(3)(j), FRAUD; AND SECTION 95.031(2), TOLLING STATUTE OF

LIMITATIONS IN A FIDUCIARY RELATIONSHIP AS REQUIRED IN *BOARD OF REGENTS, ETC. v. TOMANIO*, 466 U.S. 478, 100 S. Ct. 1790, 64 L. Ed. 2d 440 (1980); AND *HALKEY-ROBERTS CORP. v. MACKAL*, 641 So. 2d 445 (Fla. App. 2 Dist. 1994); THE RESULT OF WHICH HAS DENIED PETITIONER A JUDICIAL HEARING AND THE DENIAL OF FOURTH, FIFTH, SEVENTH AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION.

COURTS' FIRST OF TWO REASONS FOR GRANTING A RULE 12(b)(6) MOTION TO DISMISS

In Magistrate Judge Brown's Report and Recommendation the first reason for Motion to Dismiss was "*pursuant to Rule 12(b)(6) claiming that the complaint cannot state a cause of action*" which formed the precedent for all subsequent sustaining decisions: Affirmed by Order of District Judge King, and his decision was affirmed by the appellate judges in the Eleventh Circuit Court of Appeals, per curium. (Emphasis supplied) (App. C, 8a), (App. B, 3a), (App. A, 1a).

I.

PETITIONER'S ARGUMENTS AGAINST COURTS' FIRST REASON

DISTINCTIONS OF A 12(b)(6) MOTION:

Under Fed. R. Civ. P. Rule 12(b)(6) motion, said motion is allowed "*for failure to state a claim upon which relief can be granted.*" The said motion is plainly not allowed for "*failure to state a cause of action*" which has been the spurious ground, upon which, all the lower courts in this case have rendered and sustained the motion to dismiss the Petitioner's complaint.

In *Dioguardi v. Durning*, 139 F. 2d 774, 775 (2d Cir. 1945), the court held regarding a 12(b)(6) motion:

> Under the new rules of civil procedure, there is no pleading requirement of stating "facts sufficient to constitute a cause of action", but only that there be a "short and plain statement of the claim showing that the pleader is entitled to relief."

This makes the Eleventh Circuit in conflict with the Second Circuit.

In *Schlagenhauf v. Holder*, 379 U.S. 104, 122, 85 S. Ct. 234, 244, 13 L. Ed. 2d 152 (1964), this Court held:

> Federal Rules of Civil Procedure should be liberally construed, but they should not be expanded by disregarding plainly expressed limitations.

Failure to state a "cause of action" is plainly not an exception anywhere under Rule 12(b) for the pleader to have an option to make a motion on these grounds; thus, to allow it would be an expansion of the Rule. *See Schlagenhauf v. Holder, supra*. This expansion of said Rule makes the Eleventh Circuit in conflict with this court.

OTHER JUDICIAL DECISIONS ON MOTION 12(b)(6)

A Rule 12(b)(6) motion, "The motion to dismiss served the function of a demurrer under the prior practice." *See Federal Life Ins. Co., v. Ettman*, 120 F.2d 837, 839 (8th Cir. 1941) and *Dennis v. Village of Tonka Bay, infra*, demurrers having since been abolished by Fed. R. Civ. P. Rule 7(c); and therefore, said motion

sustained by the Eleventh Circuit in conflict with said rule of this Court.

In *Ward v. Hudnell*, 366 F. 2d 247, 249 (5th Cir. 1966), this court held:

> It is axiomatic that a motion to dismiss an action for failure to state a claim upon which relief can be granted admits the facts alleged in the complaint, but challenges plaintiff's right to relief based upon those facts.

Petitioner contends that since Respondent's motion was based on grounds other than required by a 12(b)(6) motion, their motion based on said erroneous ground should fail and all challenges contained therein should also fail. This motion on proper ground would admit to all alleged facts and deny a claim for relief; however, based on faulty ground it does not deny a claim; thus, sustaining a dismissal would bring the Eleventh Circuit and courts below into conflict with this Court's decision in *Conley v. Gibson, infra*, because it would be highly doubtful no set of facts could be proved. *See G.M. Leasing v. United States,* 429 U.S. 338, 97 S. Ct. 619, 50 L. Ed. 2d 530 (1977).

Mortensen v. First Federal Sav. and Loan Ass'n., 549 F.2d 884, 891 (3rd Cir. 1977) the court held:

> If a court tests the sufficiency of Section 1983 allegations under Fed.R.Civ.P. 12(b)(6) on the pleadings alone, the plaintiff need only have pleaded a sufficient nexus of state action and deprivation of property in violating Fourth Amendment applicable to the State by the Fourteenth Amendment, and will not be forced to prove those allegations at a pretrial stage.

In *Currier v. Knapp*, 442 F.2d 422, 423 (3rd Cir. 1971), the court held:

> The defense of failure to comply with the statute of frauds is an affirmative defense. Rule 8(c) of the F.R Civ. P. requires that this defense be set forth affirmatively by a party pleading to a preceding pleading. In this case, the defendants were required to file an answer to the complaint in order to raise the defense of statute of frauds. The motion to dismiss under 12(b)(6) was improper.

Likewise, Respondents have raised an affirmative defense to the statute of frauds and its limitations on a 12(b)(6) motion, rather than by a pleading which makes said motion in conflict with Rule 8(c) on subject matter and makes the Eleventh Circuit in conflict with the Third Circuit. A motion is not a pleading. *See Mellon Bank, N.A. v. Ternisky*, 999 F.2d 791 (4th Cir. 1993).

In *Smith v. Cushman Motor Works*, 8 F.R.D. 221, 222 (1948), the court summarizes the Eighth Circuit cases regarding 12(b)(6) motions to dismiss:

> Motions such as is now presented are allowed only where it appears that on the face of the complaint that ultimate relief cannot be granted. The most important part of a trial in this jurisdiction is the evidence. . . .
>
> This does not mean that this court is impervious to good pleadings; . . . . suffice it to say that the Eighth Circuit Court of Appeals has continually admonished a lower court not to dispose of a case solely upon the pleadings

> unless it appears with a legal certainty that under any set of facts the plaintiff would not be entitled to relief. *Sparks v. England*, 8 Cir., 113 F.2d 579; *Louisiana Farmers' Protection Union v. Great Atlantic & Pacific Tea Co.*, 8 Cir. 131 F.2d 419; *Musteen v. Johnson*, 8 Cir., 133 F.2d 106; *Publicity Building Reality Corporation v. Hannegan*, 8 Cir., 139 F.2d 583; *Leimer v. State Farmers Mutual Life Assurance Co.*, 8 Cir., 108 F.2d 318; *Cool v. International Shoe Co.*, 8 Cir., 142 F.2d 318; *Dennis v. Village of Tonka Bay*, 8 Cir., 151 F.2d 411.
>
> Tested by the principles announced in the foregoing authorities, it cannot now be stated with absolute finality that under any set of facts which the plaintiff might prove, whether alleged or inferred, that they are entitled to no relief.

All the included Eighth Circuit cases are in conflict with the Eleventh Circuit and in *Publicity Building Reality Corporation v. Hannegan, supra*, pages 584, 586-87 state:

> that the Collector also served upon the Travelers a written notice of levy and also a demand for payment and warrant of distraint.
>
> The Federal Rules of Civil Procedure do not sanction the disposition of doubtful issues of fact or law upon motion to dismiss for insufficiency of pleadings. The Rules contemplate a determination of all such issues by the trial court after a hearing, and

> that the trial court shall make findings of facts and conclusions of law, to the end that the parties to the litigation and the reviewing court may know the exact factual and legal basis for the trial court's decision.

SUFFICIENCY OF COMPLAINT:

Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102, 2 L. Ed. 2d 80 (1957), this Court held:

> In appraising the sufficiency of the complaint we follow the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

See Ward v. Hudnell, supra.

CONCLUSION ON MOTION UNDER 12(b)(6):

Neither Magistrate Judge Brown; the District Court Judge King nor the appellate judges, have ordered and affirmed that Petitioner's complaint "*failed to state a claim upon which relief can be granted.*" The arguments of the Respondents and Courts were directed solely to the "*failure of the complaint to state a cause of action*," which would preclude a Motion to Dismiss under Rule 12(b)(6). This spurious ground is not required by the Rules that a complaint state a "cause of action" and the Eleventh Circuit is in conflict with the Eighth Circuit Court of Appeals and others. (App. A, 1a), (App. B, 3a) and (App. C, 8a).

According to 28 U.S.C. § 2072(a)(b) all laws (court decisions) in conflict with such rules shall be of no further force

or effect after such rules have taken effect. Ostensibly, the lower courts' decisions (laws) in Petitioner's case are in conflict with the Rules now in effect; therefore, the courts' below decisions are of no force and effect. For meaning of "laws" as "court decisions" *see Illinois v. City of Milwaukee, Wisconsin*, 406 U.S. 91, 99-100, 92 S. Ct. 1385, 1390-91, 31 L. Ed. 2d 712 (1972). The courts below have ignored or glossed over the complaint's allegations of constitutional violations. (App. C, 14a).

COURTS' SECOND OF TWO REASONS FOR GRANTING A RULE 12(b)(6) MOTION TO DISMISS

In Magistrate Judge Brown's Report and Recommendation the second reason for the Motion to Dismiss is "*a Motion to Dismiss under the same rule [Rule 12(b)(6)] based on the allegations that the claim is barred by the Statue of Limitations.*" which formed the precedent for all subsequent sustaining decisions: affirmed by Order of District Judge King, and his decision was affirmed by appellate judges in the Eleventh Circuit Court of Appeals, per curium. (Emphasis supplied). (App. C, 8a), (App. B, 3a), (App. A, 1a).

II.

PETITIONER'S ARGUMENTS AGAINST COURTS' SECOND REASON

STANDARD OF REVIEW COURT OF APPEALS:

It is impossible for petitioner to determine by what standard of review the Eleventh Circuit Court of Appeals used on Petitioner's appeal on a per curium decision. However, in most cases they are reviewed *de novo* and in *Salva Regina College v. Russell*, 499 U.S. 225, 231, 111 S. Ct. 1217, 1221, 113 L. Ed. 2d 2190 (1991) this Court concluded:

> "that a court of appeals should review *de novo* a district court's determination of state law.... The obligation of responsible appellate jurisdiction implies the requisite authority to review independently a lower court's determinations." ... "rule of deference" rejected by this court.... "When *de novo* review is compelled, no form of appellate deference is acceptable."

In *Spencer v. Assurance Co. of America*, 39 F.3d 1146 (11th Cir. 1994) the Eleventh Circuit Court of Appeals acknowledged their responsibility under *Salva, supra.*

Petitioner suspects "rule of deference" was applied because the appeals court sustained the district court's order even though Petitioner pointed out in his appeal the same district judge had made a correct decision in *Korman v. Iglesias*, 736 F. Supp. 261 (S.D. Fla. 1990); but, an opposite decision on the same statutes in Petitioner's case. Had the Court of Appeals made independent determination of state law, surely *Halkey-Roberts Corp. v. Mackal, infra*, would have affected their judgment to reverse the district court's judgment and analysis of Florida statutes sec. 95.11(3)(j) and their not applying sec. 95.031(2) tolling of limitations as facts in this case require.

Statute of limitations is not a defense excepted anywhere under Rule 12(b) to allow a pleader the option of making this defense by a motion. Rather, the Rule requires that those defenses not specifically enumerated in Rule 12(b) shall be by responsive pleading which is certainly not by a motion; *see Mellon, supra*; and to allow a motion as a responsive pleading would be an expansion of the plainly stated Rule; thus, in conflict with this Court's decision in *Schlagenhauf v. Holder, supra*, and void by 28 U.S.C. § 2072.

In Rule 8(c), the statute of limitations and fraud are enumerated as an affirmative defense and each is to be set forth affirmatively in a pleading; and a Motion to dismiss on grounds of statute of limitations is not a pleading; *see Mellon, supra*, which brings the issue of granting such a motion on the grounds of statute of limitations into conflict with said Rule by expanding same. Thus, making the motion to dismiss on grounds of statute of limitations is of no force and effect under 28 U.S.C. § 2072 and expanded under *Schlagenhauf v. Holder, supra.*

JUDICIAL DECISION ON RULE 12(b)(6) MOTION:

STATUTE OF LIMITATIONS

In *Bethel v. Jendoco Construction Corp.*, 570 F.2d 1168, 1174 (3d Cir. 1978):

> Under Fed.R.Civ.P Rule 8(c) the statute of limitations constitutes an affirmative defense to an action. Under the [law] of this and other circuits, however, the limitations defense may be raised on a motion under Rule 12(b)(6), but only if "the time alleged in the statement of a claim shows that the cause of action has not been brought within the statute of limitations.

(Emphasis supplied, law means court decisions; *see Illinois v. City of Milwaukee, supra.*)

See Currier v. Knapp, supra (statute of frauds):

> If "the bar is not apparent on the face of the complaint, then it may not afford a basis for a dismissal of the complaint under Rule 12(b)(6)."

It should be observed again that the authority to meld Rules, to expand them, to substitute motions for demurrers is not by the authority of the Supreme Court or Congress as they are never cited as authorities for Rule 12(b)(6) motions, just the law (court decisions) of the Circuits. Said motion's application may be well and good in some circumstances but, Petitioner believes it's inappropriate to a civil right's controversy and claim involving federal "equity doctrine" and fraud to subvert a citizen's procedural due process of law and Fourth Amendment provisions of the Constitution.

However, Petitioner is not opposed to *Bethel, supra,* as stated, but takes umbrage in its misapplication and asserts with all vehement objection that any apparent bar of limitation is on the face of Petitioner's complaint; which brings the Eleventh Circuit into conflict with the Third Circuit and others.

It should be observed also that statute of limitations is associated with Rule 12(b)(6) "failure to state a claim upon which relief may be granted", but a Rule 12(b)(6) motion functioned as a demurrer, *see e.g., Federal Life Ins. Co., supra*; thus, statute of limitations if included thereunder must function as a demurrer also, which is abolished under the plain language of Rule 7(c) and is not contained in 12(b) at all, but only by a former implication, thus, how can an implication be expanded or be drawn from its abolishment. Therefore, the only viable standard for a Rule 12(b)(6) motion is *Conley v. Gibson, supra.*

The complaint in this case alleges a fraud in Florida under F.S. sec. 95.11(3)(j). Injury of fraud occurred in February 1987 in a fiduciary relationship and the fraud wasn't discovered, "discovery rule" F.S. sec. 95.031(2), until August 1, 1990; when the four year limitation of F.S. sec. 95.11(3)(j) actually began to run. The complaint was filed on February 10, 1993 within four years statute of limitations and within the twelve years of repose as required.

Just from the complaint alone, without any evidence, being the only pleading filed and it presumed to be true; it cannot logically be ascertained conclusively, without a doubt, or with a certainty as a matter of law that the statute of limitations has run; unless the twelve year period of repose had expired at filing date, because there is no fact of evidence presented in the case so far.

In *Board of Regents, Etc. v. Tomanio*, 466 U.S. 478, 100 S. Ct. 1790, 64 L. Ed. 2d 440 (1980) this Court held:

> Congress did not establish a statute of limitations or a body of tolling rules applicable to actions brought in federal court under Section 1983 — a void which is commonplace in federal statutory law. When such a void occurs, this Court has repeatedly "borrowed" the state law of limitations governing an analogous cause of action.
>
> In Section 1983 actions, however, a state statute of limitations and the coordinate tolling rules are more than a technical obstacle to be circumvented if possible. In most cases, they are binding rules of law. In 42 U.S.C. Section 1988, Congress "quite clearly instructs [federal courts] to refer to state statutes" when federal law provides no rule of decision for action brought under Section 1983.
>
> We went on to observe that this "borrowing" logically included rules of tolling:
>
> Any period of limitation . . . is understood fully only in the context of the various

> circumstances that suspend it from running against a particular cause of action.

See Robertson v. Wegmann, 436 U.S. 584, 98 S. Ct. 1991, 56 L. Ed. 2d 554 (1978); *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 95 S. Ct. 1716, 44 L. Ed. 2d 295 (1975) and *Monroe v. Pape*, 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961).

The lower courts in the Eleventh Circuit are in conflict with this Court's decision herein above and Title 42 U.S.C. § 1988.

FEDERAL EQUITY DOCTRINE

In *Holmberg v. Armbrecht*, 327 U.S. 392, 66 S. Ct. 582, 90 L. Ed. 713, 162 A.L.R. 719, 723 (1946) this Court held:

> And so, a suit in equity may lie though a comparable cause of action at law would be barred.
>
> If want of due diligence by the plaintiff may make it unfair to pursue the defendant, fraudulent conduct on the part of the defendant may have prevented the plaintiff from being diligent and may make it unfair to bar appeal to equity because of mere lapse of time.
>
> Equity will not lend itself to such fraud and historically has relieved from it. It bars a defendant from setting up such a fraudulent defense, as it interposes against other forms of fraud. And so this Court long ago adopted as it own the old chancery rule that where a plaintiff has been injured by fraud and

> "remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered though there is no special circumstances or effort on the part of the party committing the fraud to conceal it from the knowledge of the other party." [citations omitted]
>
> This equitable doctrine is read into every federal statute of limitation. * * * It would be too incongruous to confine a federal right within the bare terms of a State statute of limitation unrelieved by settled federal equitable doctrine as to fraud, when even a federal statute in the same terms would be given the mitigating construction required by that doctrine.

Under Fed. R. Civ. P. Rule 1, the scope and purpose of the Rules are to govern the district courts in all suits of a civil nature whether cognizable as cases at law or in equity. Thus, the "Equitable Doctrine" reasonably applies to the United States courts below.

FLORIDA STATUTES OF FRAUD AND STATUTE OF LIMITATIONS:

F.S. sec. 95.11(3)(j) Fraud (App. D, 25a); and,

F.S. sec. 95.031(2) Computing Time (Tolling) (App. D, 25a).

FLORIDA JUDICIAL DECISIONS:

CONSTRUCTIVE FRAUD
in a Fiduciary Relationship (Species of Fraud)

In *Harrell v. Branson*, 344 So. 2d 604 (Fla. App.), *cert. denied*, 353 Fla. 2d 75 (1977), the court held:

> Constructive fraud may exist independently of an intent to defraud. It is a term which is applied to a great variety of transactions that equity regards as wrongful, to which it attributes the same or similar effects as those that follow from actual fraud and for which is the same or similar relief. Thus constructive fraud is deemed to exist where a duty under a confidential or fiduciary relationship has been abused.

In *Halkey-Roberts Corp. v. Mackal*, 641 So. 2d 445 (Fla. App. 2 Dist. 1994) the court held:

> Constructive fraud is simply a term applied to a great variety of transactions * * * which equity regards as wrongful, to which it attributes the same or similar effects as those that follow from actual fraud and for which is the same or similar relief as that granted in cases of real fraud. . . .
>
> *Douglas v, Ogle*, 80 Fla. 42, 85 So. 243, 244 (Fla.1920). As a recognized species of fraud, constructive fraud is controlled by section 95.11.3(j), Florida Statutes (1991), a four year limitations period, and the discovery rule of section 95.031(2) applies.

> The continuing torts-doctrine is recognized under our state law. See Seaboard Air Line R.R. v. Holt, 92 So.2d 169 (1956).

UNDUE INFLUENCE
in a Fiduciary Relationship (Species of Fraud)

In re Guardianship of Rekasis, 545 So. 2d 471, 473-74 (Fla. App. 2 Dist. 1989), "when a confidential or fiduciary relationship existed" between the parties, the court held :

> Undue influence is a species of fraud. It differs from fraud to the extent that it can exist even where all the facts surrounding the transaction infected with undue influence have been truthfully and fully represented. [Citation omitted] Undue influence is treated as fraud in general. Peacock v. DuBois, 90 Fla. 162, 105 So. 321 (1925).
>
> Courts in other jurisdictions have held that as a matter of law, facts giving rise to a cause of actions based on undue influence do not become discoverable by exercise of reasonable diligence until the termination of influence. (Citations omitted). We agree. . . .

CONCLUSION

In Petitioner's view, the lower courts have ignored or glossed over the claims of Fourth Amendment rights' violations in the complaint that were the result of fraudulent conduct of misrepresentation of law and statutes occurring in a fiduciary relationship and except for that relationship, the violations and injuries through fraud could not have occurred. They could not have occurred if a full and meaningful hearing was provided with a fair and impartial judge.

Solely from the allegations in Petitioner's complaint, taken as true; as a matter of law, it cannot conclusively be determined that the limitations have run. There are no defects in the complaint because the fundamental essential facts are pled, among which, include constitutional rights' violations and the allegation of fraud in a fiduciary relation and the discovery of fraud which are clearly alleged on the face of the complaint and the lower courts have erred in their judgments regarding tolling statute of limitations as they erred in judgments regarding a cause of action.

There has been neither a full and meaningful pre-seizure hearing of Petitioner's pension wages nor a post-seizure hearing because of the fraud. The lower courts now wish to seemingly inflict a no judicial hearing governmental policy by the dismissal of this complaint based on spurious grounds that are not in accord with this Court's decisions and rules and statutes. *See Sniadach v. Family Finance Corp.*, 395 U.S. 337, 341-42, 89 S. Ct. 1820, 1822-23, 23 L. Ed. 2d 349 (1969); and *Fuentes v. Shevin*, 407 U.S. 67, 81-82, 92 S. Ct. 1983, 1994-95, 32 L. Ed. 2d 556 (1972).

The courts' below misapplication of limitations and tolling under the federal common law "federal equity doctrine" and Florida statutes regarding fraud in a fiduciary relation; their

inconsistency and misapplication of this Court's decisions and Rules, require that this Court's power of supervision should be exercised to overrule and reverse both of the lower court's decisions to be congruous with this Court on the requirements set forth in *Conley v. Gibson, supra*; and require the Petitioner's complaint and claims be answered in a fair and impartial proceeding.

In Petitioner's case, all the essential facts entitling the Petitioner to equitable relief are pled in the complaint. They have been presented to a court to which the Constitution, the acts of Congress and by this Court's decisions as federal common law have granted the power, and upon which they have imposed a duty, to grant relief to which the Petitioner is equitably entitled. By these foregoing facts and reasons, certiorari should be granted.

Respectfully submitted,

RICHARD BURNS
Petitioner, Pro Se
505 Beachland Boulevard. # 168
Vero Beach, Florida 32963

APPENDIX A — FINAL ORDER OF THE ELEVENTH CIRCUIT COURT OF APPEALS FILED FEBRUARY 1, 1995

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-5326
Non-Argument Calendar

D. C. Docket No. 93-248-CIV-JLK

RICHARD BURNS,

Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA, UNITED STATES INTERNAL REVENUE SERVICE, ALAN KELSO, individually and as Internal Revenue Service Officer, UNKNOWN AGENTS, individually and as agents of Internal Revenue Service, DONALD MARCH, JR., Individually, AURELIO PEREZ-LUGONES, Individually, JESSE DINAR, Individually, CHARLES HALL, Individually, ALEXANDER GURDAK, Individually, TYRONE KENNEDY, Individually, ROBERT WEILBACHER, Individually, MARK WISNER, Individually, ELENA RODRIGUEZ, Individually, STEPHEN CYPEN, Individually and as City of Miami Fire Fighters' and Police Officers' Retirement Trust Personnel, CITY OF MIAMI FIREFIGHTERS' AND POLICE OFFICERS' RETIREMENT TRUST PERSONNEL,

Defendants-Appellees.

Appeal from the United States District Court
For the Southern District of Florida

Appendix A

(February 1, 1995)

Before KRAVITCH, HATCHETT and DUBINA, Circuit Judges.

PER CURIAM:

AFFIRMED. See Eleventh Circuit Rule 36-1.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF FLORIDA DATED NOVEMBER 22, 1993

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 93-0248-CIV-KING

RICHARD BURNS,

Plaintiff,

vs.

UNITED STATES, et al.,

Defendant.

ORDER AFFIRMING MAGISTRATE'S REPORT AND RECOMMENDATION AND DISMISSING PLAINTIFF'S COMPLAINT WITH PREJUDICE

THIS CAUSE comes to this Court for independent review of United States Magistrate Judge Steven T. Brown's Report and Recommendation (the "R & R") entered October 29, 1993. The Report recommends entry of a final order of dismissal with prejudice pursuant to Rule 12 (b) (6) of the Federal Rules of Civil Procedure. Plaintiff filed Objections to the Magistrate's R & R, on November 15, 1993, in which he lists objections to each sentence and/or paragraph in the R & R.

This case arises out of a dispute over a levy the Internal Revenue Service (the "IRS") placed on Plaintiff's Retirement Board for payment of Plaintiff's unpaid taxes. Plaintiff alleges that the IRS's illegally levied and seized his funds because the seizure was not done pursuant to a distress warrant as require by

31 U.S.C. § 3541. In the R & R, Magistrate Judge Brown concluded that the Complaint should be dismissed on two grounds. First, Magistrate Brown concluded that Plaintiff failed to raise his claim within the applicable four year statute of limitation period. Secondly, Magistrate Brown found that Plaintiff failed to state a claim for violation of 31 U.S.C. § 3541 because the Plaintiff's funds do not constitute "public monies" and therefore 31 U.S.C. § 3541 does not apply.

After an independent review of the record and the applicable statutory law, this Court concludes that Plaintiff's objections are without merit and will uphold the findings and conclusions of Magistrate Brown.

First, Plaintiff argues that Magistrate Judge Brown erroneously concluded that Plaintiff's claim fell outside the applicable limitation period. The statute of limitation period for actions such as this is four years, but it does not begin to run until "the plaintiff knows or has reason to know of the injury which is the basis of the action. *New Port Largo, Inc. v. Monroe County,* 706 F. Supp. 1507, 1515 (S.D. Fla. 1988). In his Objections, Plaintiff apparently concedes the four year statute of limitation period, but argues that Magistrate Brown misconceived the triggering date. Plaintiff contends that the limitation period did not begin to run until August 1, 1990 — the date that his research revealed what he believed to be actionable case law.

However, on the face of the Complaint, Plaintiff indicates that he had knowledge or reason to know of certain activities that he felt were improper or illegal by at least October 1988, over four years prior to filing his claims.[1] For instance, Plaintiff specifically alleges in the Complaint that the improper activity

1. Plaintiff did not file his Complaint until February 10, 1993.

giving rise to his claim began on or about January 2, 1997. (Complaint, paragraph 28). And, Plaintiff goes on to allege that the illegal seizures commenced on February 10, 1987 and continued through October 15, 1988. (Complaint, paragraph 31). Based on these facts, which must be taken as true for purposes of considering the Motion to Dismiss, the Court cannot find that Magistrate Judge Brown was clearly erroneous in his conclusion that Plaintiff knew or had reason to know of the injury caused by the illegal procedure for over four years before bringing his claims to this Court. Thus, the Court holds that the statute of limitation period had already run by the time Plaintiff filed his claims and the Complaint should be dismissed on that basis.

Even if Plaintiff had met the statute of limitation requirements, Plaintiff's Complaint would still fail for failure to state a claim upon which relief could be granted. The thrust of Plaintiff's claim that the IRS illegally seized his retirement funds is based on 31 U.S.C. § 3541 which requires a distress warrant in order to seize public money from an official who is deficient in his or her account to the Treasury.[2] Magistrate Judge Brown concluded that Plaintiff's retirement funds do not constitute "public monies" and therefore Plaintiff's claim under 31 U.S.C. § 3541 (a) must fail. Plaintiff apparently concedes that his funds are not "public monies" but objects to the Magistrate's ultimate finding as a misinterpretation of the statute. Specifically, Plaintiff argues (1) that a distress warrant is required to seize public monies from government officials who are deficient in their accounts to the U.S. Treasury, and (2) that a legal distress warrant could not be issued against Plaintiff because he is not a government official and because he is not deficient for public monies owed to the Treasury. Therefore, Plaintiff concludes that the IRS could not legally levy and seize his funds.

2. The Court has also considered Plaintiff's Fourth Amendment argument and finds it to be invalid.

Appendix B

Plaintiff has misread 31 U.S.C. § 3541. The statutory provision states that a distress warrant is required to levy and seize a certain type of funds held by a certain category of persons. It applies solely to *public monies* seized from *government officials*. The statute does not mean that a distress warrant is required in order to seize *any* funds from *any* person. A separate provision of the Internal Revenue Code, 26 U.S.C. § 6331, gives the Secretary of the Treasury the authority to place a levy on the funds of any person who is liable to pay any tax and neglects to do so within 10 days after notice and demand. That provision is in no way dependent on the issuance of a distress warrant under 31 U.S.C. § 3541. Thus, the Court finds that Magistrate Brown was correct in concluding that 31 U.S.C. § 3541 is inapplicable to the levy and seizure of Plaintiff's retirement funds. Not only are Plaintiff's funds non-public monies, but Plaintiff, by his own admission, is not a government official.

Accordingly, after an independent review of the record, and for the reasons stated herein, it is

ORDERED and ADJUDGED that Magistrate Judge Brown's Report and Recommendation to Dismiss the Complaint be, and the same is hereby, AFFIRMED, and it is further

ORDERED and ADJUDGED that for the reasons stated in the Report and Recommendation, Plaintiff's Complaint be, and the same is hereby, DISMISSED WITH PREJUDICE.

DONE and ORDERED in chambers at the United States District Courthouse, Federal Justice Building, Miami, Florida, this 22nd day of November, 1993.

Appendix B

JAMES LAWRENCE KING
JAMES LAWRENCE KING
U.S. DISTRICT JUDGE
SOUTHERN DISTRICT OF FLORIDA

cc: Honorable U.S. Magistrate Judge Brown
Richard Burns, Pro se
Hugo L. Black, Jr., Esq.
A.B. Phillips, Esq. - AUSA
Grisel Alonso, Esq. - AUSA

APPENDIX C — REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF FLORIDA DATED OCTOBER 10 , 1993

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 93-248 CIV KING

RICHARD BURNS,

Plaintiff,

vs.

UNITED STATES, et al.,

Defendants.

REPORT AND RECOMMENDATION

THIS MATTER is before this court on Motions to Dismiss of all of the Defendants. Ten of the individually named defendants (hereinafter referred to as "Retirement Trust Defendants") have moved to dismiss the complaint on several grounds. Additionally, the United States has filed two Motions to Dismiss. Among numerous grounds raised for dismissal by the various defendants are Motions to Dismiss this case pursuant to Rule 12(b)(6) claiming that the complaint cannot state a cause of action, and a Motion to Dismiss under the same rule based on the allegation that the claim is barred by the Statute of Limitations. As will be seen herein, addressing these two issue will obviate the necessity of addressing the numerous other grounds raised by the various parties.

Appendix C

FACTS

The plaintiff filed his complaint on February 10, 1993 and filed an "Amendment to Complaint" (D.E. 28) on April 26, 1993. That amendment does not comport with the Federal Rules of Civil Procedure, and in the event that the District Judge overrules this Report and Recommendation, the amendment should nonetheless be stricken from the record with allowance to the plaintiff to file a proper Amended Complaint.

The thrust of the entire cause of action by the plaintiff can be found in paragraph 20 of the original complaint. Plaintiff allegedly owed taxes to the Internal Revenue Service. The Internal Revenue Service submitted a Notice of Levy to Plaintiff's retirement board and levied upon retirement funds held by the board for payment of plaintiff's taxes.

Plaintiff raises various theories as to why this levy and seizure were improper, all of which, as will be shown, are incorrect as matter of law.

Plaintiff's main argument is that the levy without a distress warrant was improper and that since the plaintiff is not an officer employer official of the United States the section under which the levy was made (26 U.S.C. § 6331) was improperly utilized.

As a result of these fairly simple facts, the plaintiff has attempted to allege a variety of theories under which the various defendants can be held liable.

Since plaintiff's underlying foundation is, as a matter of law incorrect, and since this claim is barred, as a matter of law by the Statute of Limitations, this court need not address the various legal theories in detail.

Appendix C

Suffice it to say that the plaintiff is a disgruntled tax payer who has spent significant, albeit wasted, time to grasp at any straw that might change the outcome of his failure to pay his taxes.

DISCUSSION

A motion to dismiss pursuant to Federal Rule of Civil Procedure 12 (b)(6) should not be granted unless it appears beyond doubt that the plaintiffs can prove no set of facts in support of the claim which would allow relief. *Bank v. Pitt,* 928 F.2d 1108, 1111-1112 (11th Cir. 1991). Leave to amend a complaint "shall be freely given when justice so requires." Fed.R.Civ.P. 15(a).

Plaintiff's entire cause of action rises (or falls) on the premise that the levy which was executed was improper. Plaintiff claims that there had to have been a distress warrant utilized and cites, in support of his position, a 1947 case from the Sixth Circuit. See *U.S. v. O'Dell,* 160 F.2d 304 (6th Cir. 1947). However, the problem with plaintiff's legal research is two fold:

1. The Internal Revenue Code upon which *O'Dell* is based changed after that decision was rendered, and;

2. Numerous cases throughout the country have departed from that authority. See e.g. *In the Matter of Chicagoland Ideel Cleaners. Inc. v. U.S.A.,* 495 F.2d 1283 (7th Cir. 1974); *U.S.A. v. Pittman,* 449 F.2d 623 (7th Cir. 1971); *Rosenblum v. U.S.A.,* 300 F.2d 843 (1st Cir. 1962); *U.S.A. v. Eiland,* 223 F.2d 118 (4th Cir. 1955); *U.S. v. Manufacturer's National Bank,* 198 F.Supp. 157 (N.D.N.Y. 1961). Indeed the present Internal Revenue Code is quite clear.

Appendix C

> If any person liable to pay any tax neglects or refuses to pay the same within ten day after notice and demand, it shall be lawful for the Secretary to collect such tax . . . by levy upon all property and rights to property . . . belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. See 26 U.S.C. § 6331(a). It is true that subsection (b) states "The term 'levy' as used in this title includes the power of distraint and seizure by any means." However that does not change the applicable law.

Plaintiff contends that 31 U.S.C. § 3541 requires a distress warrant which was not used in this case. The clear wording of that section indicates that the warrant only applies "when an official receiving public money before it is paid to the Treasury . . ." (31 U.S.C. § 3541(a) (emphasis added)). However, the monies held by the retirement trust which were seized by the government pursuant to levy were not public money. See e.g. *Hood v. Hardesty,* 94 F.2d 26 (4th Cir. 1938) *cert. denied* 303 U.S. 661, 68 S.Ct. 765, 82 L.Ed. 1120 (1938); *Federal Deposit Insurance Corporation v. Tremaine,* 37 F.Supp. 177 (S.D. N.Y. 1940).

In the only case construing the definition of public money under Federal Law, Judge Knox found "that 'public monies' within the contemplation of Section 90 [12 U.S.C. § 90] includes only those funds in which the beneficial title and right is in the State or its political subdivisions . . . the words do not comprehend monies in which legal title thereto may be in a municipal officer acting in his official capacity, and which are held for the benefit of private persons." See *Federal Deposit Insurance Corporation, supra.* at 182. The monies which were

seized by the Internal Revenue Service were clearly private monies, that is, monies being held in the retirement trust for individual private citizens. Thus even if the plaintiff's argument that somehow a distress warrant is still the law, it would not apply under the facts of this case. Since the entire thrust of the plaintiff's claim is that the failure to utilize a distress warrant gives rise to a myriad of causes of action, the entire complaint must fail.

Plaintiff further argues that he was not an officer, employee, or elected official of the United States, the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia and therefore a levy pursuant to 26 U.S.C. § 6331 does not apply to him. That premise is likewise legally unsupportable. A reading of the section in question is sufficient to resolve that issue because the section commences "If any person liable to the pay any tax . . ." the person is subject to levy. The section goes onto say "Levy may be made upon the accrued salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States or District of Columbia, by serving a notice of levy on the employer . . ." Plaintiff has utilized this language to suggest that the section only applies to the aforementioned classes of people. However the language relied upon only refers to the method of collection as to a specific group of people. Indeed the United States Supreme Court has specifically held that this section applies to all state and municipal employees as well, and plaintiff's argument, as a matter of law, must fail. See *Edgar B. Sims, Petitioner v. U.S.A.*, 359 U.S. 108, 79 S.Ct. 641, 3 L.Ed.2d 667 (1959). Therefore the second major promise of the plaintiff's complaint also fails, as a matter of law.

Appendix C

DISCUSSION - STATUTE OF LIMITATIONS

While the bar of the Statute of Limitations is generally an affirmative defense, it is appropriately raised under Rule 12(b)(6) when it clearly appears from the face of the complaint that dismissal is proper on that basis. See e.g. *White v. Padgett,* 475 F.2d 79 (5th Cir. 1973)[1]; *Ft. Lauderdale v. Ross, Sarrinen, Bolton and Wilder,* 815 F.Supp. 444 (S.D. Fla. 1992); *Loewer v. New York Life Ins. Company,* 773 F.Supp. 1518 (M.D. Fla. 1991); *Josef's of Palm Beach. Inc. v. Southern Investment Company,* 349 F.Supp. 1057 (S.D. Fla. 1972).

Plaintiff alleges (paragraph 28) that the improper activity giving rise to this claim commenced on or about January 2, 1987. He further alleges (paragraph 31) that the unlawful seizures of his funds began on February 10, 1987 and continued through and including October 15, 1988. He further alleges that in March of 1987 he personally appealed before the Retirement Board with regard to the seizures that were taking place. (Paragraph 36 of the complaint). The plaintiff argues that his claims under the Federal Statutes "have no statute of limitations" and that in the alternative the complaint was filed within the applicable statute of limitations since the statute of limitations did not begin to run "until the discovery of the fraud, which as stated within the Complaint (paragraph 39) occurred on or about August 1, 1990."

Since there is no federal statute of limitations, the proper procedure is to look to the state and utilize its applicable statute of limitations provided it is not inconsistent with the laws of the United States and the Constitution. See e.g. *New Port Largo, Inc. v. Monroe County,* 706 F.Supp. 1507 (S.D. Fla. 1988). As argued

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1. Cases decided by the 5th Circuit prior to October 1, 1981 are binding in the 11th Circuit. See *Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir. 1981).

in the Motion to Dismiss of the Retirement Trust Defendants, numerous cases apply Florida's four year statute of limitations to the causes of actions raised herein. (See page 3 of the Motion to Dismiss of the Retirement Trust Defendants). See also *New Port Largo, Inc., supra.* at 1515. However, the statute does not begin to run until "the plaintiff knows or has reason to know of the injury which is the basis of the action." *Id.* See also *Josef's of Palm Beach, Inc., supra.* (discovery of a violation so as to trigger the statute of limitations "means either actual knowledge of facts or notice of facts which, *in the exercise of due diligence,* would have led to actual knowledge of the violation" *Josef's of Palm Beach, Inc., supra.* at 1061) (emphasis added). A party cannot rely on lack of knowledge of the specific cause of the problem in order to protect it from the expiration of a statute of limitations. See *Ft. Lauderdale, supra.* at 446.

Plaintiff's argument that the federal causes of action have no statute of limitations is, as noted, completely without merit. Plaintiff attempts to argue against the applicable Florida statute of limitations by relying on the allegations in paragraph 39 of his complaint. "On or about August 1, 1990, the plaintiff discovered after diligently searching the law for the true facts about I.R.S. levies . . .". This court rejects that discovery date as the triggering date for the statute of limitations. Plaintiff was clearly on notice, by his own allegations in the complaint, of numerous activities he felt were improper and illegal by, at the latest, October of 1988. While plaintiff has inadequately supported his claim of constitutional violations under the Fourth, Fifth and Seventh Amendments (see allegations in paragraphs 45 and 46 of the complaint) because the foundation of these alleged constitutional violations again turns to plaintiff's false legal conclusion that a distress warrant was necessary for the levy, the fact remains he surely cannot suggest, nor has he, that he did not discover the Constitution until August of 1990.

Appendix C

Additionally, this court rejects, as a basis for the starting date for the running of a statute of limitations, the date on which plaintiff's research revealed what he believed to be actionable case law. To accept this argument for the beginning of running of the statute of limitations would allow all statutes of limitations to remain tolled until legal personnel got around to, and completed, what they believed was appropriate research to locate a cause of action. It is noted that plaintiff discovered the case upon which he relies (albeit improperly) almost two years after the last seizure occurred. Accordingly, it appearing on the face of the complaint that it was filed more than four years after the last activity which would have given rise to a cause of action (if indeed there was one), this court finds the claim barred by the applicable statute of limitations.

RECOMMENDATION

It is therefore respectfully recommended that the Motion to Dismiss of the Retirement Trust Defendants (D.E. 19) the Motion to Dismiss of the United States of America (D.E. 27) and the Second Motion to Dismiss of the United States of America (D.E. 31) all be GRANTED, with prejudice and that this case be dismissed.

The parties have ten (10) days from the date of this Report and Recommendation within which to serve and file written objections, if any, with the Honorable James Lawrence King, Senior United States District Judge for the Southern District of Florida. Failure to file objections timely shall bar the parties from attacking on appeal the factual findings contained herein. *LoConte v. Dugger,* 847 F.2d 745 (11th Cir. 1988), *cert. denied,* 488 U.S. 958, 109 S.Ct 397 (1988).

Appendix C

DONE AND ORDERED this 29th day of October, 1993 at Miami, Florida.

s/ Stephen T. Brown
STEPHEN T. BROWN
U.S. MAGISTRATE JUDGE

cc: Honorable James Lawrence King
Richard Burns, Pro se
Hugo L. Black, Jr., Esq.
A.B. Phillips, Esq.
Grisel Alonso, Esq. - AUSA

APPENDIX D — PERTINENT TEXT OF UNITED STATES CONSTITUTION, STATUTES, RULES, FLORIDA STATUTES AND OTHER AUTHORITIES

UNITED STATES CONSTITUTION

Article III, Section 2, para.1, provides in pertinent part:

> The judicial Power shall extend to all Cases, in law and equity, arising under this Constitution, the laws of the United States and Treaties . . . to controversies to which the United States shall be a party . . . [omitted for brevity].

Fourth Amendment, provides in pertinent part:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not to be violated and no warrant shall issue, but upon probable cause supported by Oath or affirmation particularly describing the thing to be seized.

Fifth Amendment, provides in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. [omitted for brevity].

Seventh Amendment, provides in pertinent part:

> In Suits at common law, where the value in

controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. . . .

Fourteenth Amendment, provides in pertinent part:

Section 1.

. . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

UNITED STATES STATUTES

26 U.S.C. § 3401(d), provides in pertinent part:

Employer. For the purposes of this chapter, the term "employer" means the person for whom an individual performs or performed any service, of whatever nature, as the employee of such person, ...

26 U.S.C. § 6331 Levy and Distraint, provides in pertinent part:

(a) Levy may be made upon the accrued salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States or the

District of Columbia, by serving a notice of levy on the employer (as defined in section 3401(d)) of such officer employee or elected official.

(b) The term "levy" as used in this title includes the power of distraint and seizure by any means.

28 U.S.C. § 1331, provides in pertinent part:

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1343, provides in pertinent part:

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * *

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

28 U.S.C. § 2072(a)(b), provides in pertinent part:

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts .... and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

28 U.S.C. § 2101(c), provides in pertinent part:

(c) . . . any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree.

28 U.S.C. § 2463, provides in pertinent part:

All property taken or detained under any revenue law of the United States shall not be repleviable, but shall be deemed in the

> custody of the law and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof.

31 U.S.C. § 3541. Distress Warrants, provides in pertinent part:

> **(a)** When an official receiving public money before it is paid to the Treasury or a disbursing or certifying official of the United States government does not submit an account or pay the money as prescribed by law, the Comptroller General shall make the account for the official and certify to the Secretary of the Treasury the amount due the Government.
>
> **(b)** The Secretary shall issue a distress warrant against the official stating the amount due from the official and any amount paid.

42 U.S.C. § 1983, provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

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42 U.S.C. § 1988. Proceedings in vindication of civil rights, provides in pertinent part:

> **(a) Applicability of statutory and common law**
>
> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of titles 13, 24, and 70 of the Revised Statutes for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the state wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause . . . .

FEDERAL RULES OF CIVIL PROCEDURE

Rule 1. Scope and Purpose of Rules, provides in pertinent part:

> These rules govern the procedure in the

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> United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity . . . They shall be construed and administered to secure just, speedy, and inexpensive determination of every action.

Rule 7. Pleadings Allowed: Form of Motions, provides in pertinent part:

> **(c) Demurrers, Pleas, Etc., Abolished.** Demurrers, pleas, and exception for insufficiency of a pleading shall not be used.

Rules 8. General rules of Pleading, provides in pertinent part:

> **(c) Affirmative Defenses.** In pleading to a preceding pleading, a party shall set forth affirmatively .... statute of limitations, waiver and other matter constituting an avoidance or affirmative defense.
>
> * * *
>
> **(f) Construction of Pleadings.** All pleadings shall be so construed as to do substantial justice.

Rule 9. Pleading Special Matters, provides in pertinent part:

> **(b) Fraud, Mistake, Condition of Mind.** In all averments of fraud or mistake, the

> circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge and other condition of mind of a person may be averred generally.

Rule 12. Defenses and Objections, provides in pertinent part:

> **(b) How presented.** Every defense, in law or fact, to claim for relief in any pleading, whether a claim, counterclaim, crossclaim, or third party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:
>
> * * *
>
> **(6)** failure to state a claim upon which relief can be granted. . . .

Rule 15. Amended and Supplemental Pleadings, provides in pertinent part:

> **(a) Amendments.** A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served. . . .

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FLORIDA STATUTES

Section 95.11(3)(j), Fla. Stat., provides in pertinent part:

> **95.11** Actions other than for recovery of real property shall be commenced as follows:
>
> * * *
>
> **(3)** within four years-
>
> * * *
>
> **(j)** a legal or equitable action founded on fraud

Section 95.031(2), Fla.. Stat., Computation of Time, provides in pertinent part:

> **95.031** Except as provided in subsection (2) . . . the time within which an action shall be begun under any statute of limitations runs from the time the cause of action accrues. [omitted for brevity]
>
> **Subsection (2)** Actions for products liability and **fraud** under s.95.11 (3) must be begun within the period prescribed in this chapter, with the period running from the time the facts giving rise to the cause of action were discovered or should have been discovered with the exercise of due diligence, instead of running from the date prescribed elsewhere in

s.95.11 (3), but in any event an action for fraud under **s.95.11 (3)** must begin within 12 years after the date of the commission of the alleged fraud, regardless of the date the fraud was or should have been discovered.

OTHER AUTHORITIES CITED

City of Miami Ordinance No. 10002, provides in pertinent part:

> **Division 2, Section 40-202, Board of Trustees**
>
> **(c) Fiduciary Responsibility** Members of the board of trustees shall be named fiduciary of the Retirement system.
>
> **Division 2, Section 40-215; Assignments Prohibited**
>
> The present or future right of a person to moneys in the Fund or to a retirement allowance, . . . shall be unassignable *and shall not be subject to execution, garnishment, attachment, the operations of bankruptcy or insolvency law or any other process of law whatsoever, except with respect to alimony, child support, or medical payments to a former spouse.*" [Omitted for brevity; emphasis supplied].